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No. 06-868

In the Supreme Court of the United States

ELOUISE PEPION COBELL, *ET AL.*, PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY,
DEPARTMENT OF THE INTERIOR, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

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Trustee-Delegates' brief in opposition reinforces rather than undermines the need for the Court's review in this case. Much of their brief simply is irrelevant to the question presented in our petition and seeks to distract the Court from the compelling reasons to grant certiorari. Moreover, their brief says precious little about the central issue: the law that should govern removal and reassignment decisions under 28 U.S.C. §§ 455(a) and 2106 and the conflict between the decision below and those of this Court and other courts of appeals. The following propositions – which are largely undisputed in Trustee-Delegates' brief – firmly demonstrate that this Court's review is warranted.

1. Trustee-Delegates ignore the public significance of this case. As explained in the petition (Pet. 1-6, 15), the litigation seeks to redress grievous – and now admitted – breaches of fundamental fiduciary duties owed to 500,000, largely economically-deprived, Indian-Beneficiaries that have occurred for more than a century and that continue even today. The trust consists of the beneficiaries' own property – in aggregate, approximately 11 million acres of resource-rich and highly-productive land and the proceeds therefrom. As the court of appeals itself previously recognized, the beneficiaries "rely upon their IIM trust accounts for their financial well being .... '[T]he interests at stake are not merely economic interests ... but personal interests in life and health.'" *Cobell v. Norton (Cobell VI)*, 240 F.3d 1081, 1097 (D.C. Cir. 2001) (citation omitted); *accord Cobell v. Norton (Cobell V)*, 91 F.Supp.2d 1, 47 (D.D.C. 1999).[1]

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[1] Trustee-Delegates try to minimize the significance of the case by representing that the trust accounts have a total balance of approximately $400 million. Although that surely is a great deal of money, especially to many of the Native Americans who are members of the certified class in this lawsuit, it is in fact incorrect and grossly understates the amounts at issue. Indeed, the government readily concedes that this case involves an accounting of more than $13 billion – the proceeds of plaintiffs' trust lands though the year 2000 – plus interest accrued and that more than $300

2. Nor do Trustee-Delegates dispute the grave and delicate nature of the removal of a sitting federal judge on the ground of apparent judicial bias. That is especially so where, as here, the removal is based on the substantive correctness of the judge's rulings in carrying out his judicial office. The standard governing removal must be carefully formulated and faithfully applied in order to preserve the crucial independence of the judiciary, promote the sound administration of the federal judicial system, afford basic fairness to the individual judges involved, and protect the legitimate interests of all litigants.

3. As explained in the petition (Pet. 14-15, 17), the court of appeals' removal and reassignment decision rested on "the combination" (Pet. App. 37a) of (a) the statements in Judge Lamberth's July 12 opinion and (b) the appellate reversals of eight of Judge Lamberth's decisions (out of more than 60 published decisions, and well over a 100 other unpublished rulings or orders, over the 10-year course of this lawsuit). The court of appeals was unambiguous that its decision was based upon this "combination" (*id.*) and that it did "not decide whether such [statements], standing alone, require reassignment." *Id.* at 34a. Trustee-Delegates agree with our analysis. *See* Br. in Opp. 7-8, 11-12.

Accordingly, if, as petitioners demonstrate, the court of appeals committed legal error in relying upon the reversals to establish apparent bias, it logically and necessarily follows that the judgment below must be reversed. That is, if the reversals are, as a matter of law, eliminated from the combination upon which the court of appeals founded its decision, only the

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million is produced each year from the land corpus of this trust. *See The Indian Money Account Claim Satisfaction Act of 2003: Hearing on S. 1770 Before the S. Comm. on Indian Affairs*, 108th Cong. 2 (2003) (statement of James Cason, Assoc. Deputy Sec'y, Dep't of the Interior); *see* Pet. 3.

statements in the July 12 opinion, "standing alone" (Pet. App. 34a), would remain as the sole basis for removal and reassignment – a conclusion that the court expressly disavowed. Thus, to sustain the judgment below, the court of appeals' treatment of the reversals, as one of the two factors in the essential combination that supported (in the court's view) an inference of apparent bias, must be legally correct. That is the question presented in the petition for certiorari.

4. It is a puzzlement, therefore, that Trustee-Delegates devote such an enormous amount of space in their brief in opposition to a discussion of the statements in the July 12 opinion. *See* Br. in Opp. 3-5, 6-7, 10-11 (approximately seven of the brief's 15 pages). For purposes of this petition, that factor in the combination is simply and utterly irrelevant. Trustee-Delegates' lengthy discussion evidently is designed to prejudice the Court's view of the case and to divert the Court's attention from the issue raised.

This is not to be understood, however, to indicate petitioners' agreement with either Trustee-Delegates' or the court of appeals' analysis of Judge Lamberth's statements. Quite the contrary, as the petition noted (Pet. 17 n.14), we respectfully but vigorously disagree that these statements support removal and reassignment. The district judge's harsh criticisms were based on record evidence and described accurately the conduct of Trustee-Delegates and the appalling manner in which they have mismanaged petitioners' assets for a century (and continue to do so today). Indeed, the court of appeals itself recognized, as Trustee-Delegates are forced to concede (Br. in Opp. 6-7), that by and large the harsh language in the July 12 opinion was *fully justified* and that it too had sharply criticized Trustee-Delegates in comparably strong terms:

> Although the July 12 opinion contains harsh – even incendiary – language, much of

> that language represents nothing more than the views of an experienced judge who, having presided over this exceptionally contentious case for almost a decade, has become "exceedingly ill disposed towards [a] defendant" that has flagrantly and repeatedly breached its fiduciary obligations. *Liteky*, 510 U.S. at 550, 114 S.Ct. 1147. We ourselves have referred to Interior's "malfeasance," "recalcitrance," "unconscionable delay," "intransigen[ce]," and "hopelessly inept management." *Cobell VI*, 240 F.3d at 1096, 1109; *Cobell XII*, 391 F.3d at 257; *Cobell XIII*, 392 F.3d at 463.
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> Interior's deplorable record deserves condemnation in the strongest terms. Words like "ignominious" and "incompetent[t]" (the district court's) and "malfeasance" and "recalcitrance" (ours) are fair and well-supported by the record.

Pet. App. 32a, 33a.[2]

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[2] Indeed, as this Court recognized in *Liteky v. United States*:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill-disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to the completion of the judge's task. As Judge Jerome Frank pithily put it, "impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

510 U.S. 540, 550-51 (1994) (citation omitted).

Moreover, even those statements in the July 12 opinion that the court of appeals professed to find "more troubling" were based *entirely* on evidence of record and addressed issues clearly pertinent to the litigation. Because Trustee-Delegates have committed long-standing breaches of trust that continue to this day, the background of Interior's trust malfeasance is relevant to this litigation. Indeed, that background is crucial – particularly when "not even the government ... doubts that racism ran rampant at Interior a century ago." Pet. App. 32a. And Judge Lamberth's criticisms of Trustee-Delegates' conduct in this matter appropriately recognized that trust violations have endured for a century and that the effects of these violations persist and must be remedied.[3]

For this reason, the court of appeals was wrong in concluding that Judge Lamberth "all but accuse[d] *current* Interior officials of racism." *Id.* To observe what is irrefutable – that Interior is the "hand-me-down" of a "racist" *past* – is not to say that it is *currently* racist. *Id.* at 32a. Moreover, to root the current tragedy of trust mismanagement in Interior's historical indifference to a group of citizens the Department was, and is, charged with serving hardly misstates the case.[4]

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[3] Furthermore, contrary to what the court of appeals concluded, "Interior's motive[s]" are highly relevant here. Pet. App. 33a. The court necessarily must understand the root causes of Interior's "recalcitrance" and "malfeasance," and why Trustee-Delegates have acted the way they have, as a critical first step to determine an effective remedy for what the court of appeals itself called Trustee-Delegates' "deplorable record." *Id.*

[4] Equally well-founded was Judge Lamberth's statement that "our government still treats Native American Indians *as if* they were somehow less deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." *Id.* at 33a (emphasis added). This is merely a statement of the obvious – that no person deserves to be treated in the manner beneficiaries have been: their own property "managed" by their government without their consent, and then to have this self-imposed "trustee" grossly mismanage that property for generation after generation. Plaintiff-Beneficiaries have indeed been treated "as if" they are citizens without rights or remedies.

The court of appeals also expressed concern that Judge Lamberth "ha[d] condemned not just Interior's particular failures as trustee, but the Department as an institution." Pet. App. 34a. That statement is simply inaccurate. At no time did Judge Lamberth express that view, and the court of appeals cited nothing in the opinion below that addressed Interior's conduct outside the trust context. Indeed, as the court of appeals elsewhere acknowledged, Judge Lamberth explicitly refused to concede "that [Interior's] negligence and incompetence ... are beyond judicial remedy" – clear indication that Judge Lamberth did not believe Interior is beyond redemption. Pet. App. 24a. Nothing in the July 12 opinion reasonably suggests otherwise.

5. Turning, then to the issue presented in the petition, Trustee-Delegates – surprisingly, but revealingly – offer virtually no legal analysis of the court of appeals' use of its reversals of Judge Lamberth to support the conclusion of his apparent bias. In fact, the entirety of their response on the law occupies but a single printed page comprising two paragraphs. *See* Br. in Opp. 9.[5]

Trustee-Delegates first contend that the court of appeals correctly cited to and quoted from this Court's decision in *Liteky*. That is indisputable, and indeed the petition acknowledged as much. *See* Pet. 19. It also is beside the point. Such judicial draftsmanship does not insulate the court of appeals' holding and judgment from review by this Court. The salient issue is whether the court of appeals' removal and reassignment decision based on consideration of the reversals

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[5] Trustee-Delegates also stress (Br. in Opp. 12 n.2) that the court of appeals never affirmatively concluded that Judge Lamberth was not actually biased. That is both true and irrelevant. The court of appeals squarely grounded its decision solely on apparent judicial bias under 28 U.S.C. §§ 455(a) and 2106 and did not rely on actual bias under Section 455(b). Thus, as the petition correctly stated; "In basing reassignment on th[e] appearance of partiality, the court [of appeals] did not determine or even suggest that Judge Lamberth was actually biased or prejudiced." Pet. 14.

of Judge Lamberth complies with the law. That the panel was aware of the relevant rulings of this Court does not answer that question. Rather, for the reasons stated at length in the petition – which Trustee-Delegates essentially ignore – the decision below was erroneous as a matter of law.

6. The court of appeals' removal and reassignment decision also conflicts with the decisions of this Court and of other circuits. Once again, Trustee-Delegates blink this issue. They address not one of the many cases or other authorities cited in the petition and present not one case or legal authority of their own. *See* Br. in Opp. 9.

In a three-sentence paragraph, Trustee-Delegates attempt to brush aside our demonstration of a conflict. This is nothing more than their unsubstantiated say-so. We stand on our submission in the petition.

Without burdening the Court with repetition, the disagreement among the circuits is readily illustrated. The court below looked to the reversals as "'*evidence* of . . . bias or prejudice.'" Pet. App. 34a (citation omitted). By contrast, the Seventh Circuit has held that "[b]ias cannot be inferred from a mere pattern of rulings by a judicial officer . . . erroneous as that [officer's] view [of the law] might be"; rather, because the rulings themselves cannot give rise to an inference of bias, there must be some "evidence that the [judicial] officer had it 'in' for the party for reasons unrelated to the officer's view of the law." *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th Cir. 1989) (Posner, J.). Likewise, the Ninth Circuit has rejected the argument that a district judge's "error is itself evidence of bias." *In re Focus Media, Inc.*, 378 F.3d 916, 930 (9th Cir. 2004), *cert. denied*, 544 U.S. 968 (2005). *See* Pet. 21.

7. Furthermore, the court of appeals offered no legal standard for determining whether a district judge's rulings, later reversed on appeal, constitute evidence of apparent bias rather than simply being legal errors reached in good faith by a

conscientious, but fallible human being. Nor did it afford any explanation why the reversals of Judge Lamberth in this case were evidence of apparent bias and not merely the result of the ordinary operation of a legal system that provides appellate review – but not removal and reassignment – as the remedy for the errors of a lower court.

Here, the court of appeals asserted that removal and reassignment could be based on appellate reversals that constitute "evidence" of judicial partiality. Pet. App. 34a. It then concluded that the reversals in this case are evidence of apparent bias. However, there was no analysis to connect the premise to the conclusion or to distinguish between most reversals that reflect nothing more than judicial error and those rare reversals that are evidence of the appearance of judicial prejudice.

In particular, the various facts recited by the court of appeals – the number of reversals, the unanimity of the panels, and the applicable standard of review – do not serve as a legal test for resolving the issue of apparent bias in this case or in others. Even unanimous reversals and appellate conclusions of abuse of discretion do not indicate bias rather than error or cast doubt on the *bona fides* of the district judge. Similarly, even a series of appellate reversals – and the court of appeals gives no indication of how many are needed to raise concern – is far less likely to evince apparent bias than good-faith error, especially where, as here, they involve a small minority of the large number of rulings rendered on a vast array of issues in the course of protracted, complex, and contentious litigation.

Given the sensitivity of judicial removal and reassignment decisions, and given the strong presumption in the law that judges are impartial unless the challenging party satisfies its substantial burden to prove partiality (*see* Pet. 16-17), the court of appeals' *ipse dixit* plainly is insufficient.

8. The petition analyzes at considerable length the reversals cited by the court of appeals and demonstrates why they do not constitute any evidence of apparent judicial bias. *See* Pet. 9-15, 23-28. Once more, Trustee-Delegates offer no response. Thus, it stands unrefuted, for example, that:

- it was misleading and unfair for the court of appeals to exclude from its appellate tally the seminal decision in *Cobell VI*, which was a major victory for Petitioner-Beneficiaries and remains the single most significant decision in this litigation. *See* Pet. 7-9, 24.
- *Cobell XIII* does not demonstrate error, let alone apparent bias, since it was based upon a statutory change in law enacted by Congress after Judge Lamberth had rendered his decision. *See* Pet. 12, 25.
- *Cobell XII*, while vacating on narrow procedural grounds and remanding for further factual proceedings to develop a current and complete record, in fact affirmed Judge Lamberth on the law and rejected all of Trustee-Delegates' principal legal arguments. Pet. 11, 24-25.
- *Cobell VIII*, although reversing a contempt citation, surely does not signify judicial bias; if anything, a prejudiced or vindictive judge out to get Trustee-Delegates presumably would have proceeded in criminal contempt rather than in civil contempt as Judge Lamberth did. Pet. 10, 25-26.

While ignoring the bulk of the reversals cited by the court of appeals, Trustee-Delegates do discuss (albeit only in passing) two of the appellate decisions. *See* Br. in Opp. 12-13. Both involve not Judge Lamberth's own actions but rather those of

special masters used in this complex suit. Neither comes close to demonstrating apparent bias.

First, Trustee-Delegates cite *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006). Although they quote colorful language that the court of appeals found it "difficult to imagine a more biased way of conducting and reporting on an investigation" (*id.* at 1271), that criticism in fact was leveled not at Judge Lamberth, but at a special master and his inappropriate hiring of staff to aid with his investigation. The appellate decision thus related to the conduct of the master. Indeed, because it was a direct mandamus proceeding in the court of appeals, *Kempthorne* did not involve any rulings – let alone any errors, and certainly no apparent bias – by Judge Lamberth. *See* Pet. 13-14, 24.

Second, with respect to *Cobell VIII*, it bears noting that the United States consented to the appointment of the special master with the broad powers ultimately complained of by the United States. *Cobell VIII*, 334 F.3d at 1133. More important still, nothing in *Cobell VIII* remotely suggests bias; instead, if anything, it is merely an example of a conscientious district court committing error by imbuing a master with powers agreed to by the parties but which the court of appeals later found inappropriate. Moreover, although the court of appeals vacated the contempt citation in *Cobell VIII* on a technical legal ground, it agreed with the factual premise animating the district court's finding of misconduct: Trustee-Delegates issued "misleading" reports about trust reform. *Id.* at 1149.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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